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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 (SAN FRANCISCO DIVISION)

21 IN RE: CATHODE RAY TUBE (CRT)
22 ANTITRUST LITIGATION

Case No. 07-5944 SC
MDL No. 1917

23 This Document Relates to:

24 *Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,*
25 Case No. 3:11-cv-05513

26 *Best Buy Co., Inc., et al. v. Technicolor SA, et*
27 *al.,* Case No. 13-cv-05264

28 *CompuCom Systems, Inc. v. Hitachi, Ltd., et*
al., Case No. 3:11-cv-06396

Costco Wholesale Corp. v. Hitachi, Ltd., et
al., Case No. 3:11-cv-06397

**DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE CERTAIN
EXPERT TESTIMONY OF
PROFESSOR KENNETH ELZINGA**

ORAL ARGUMENT REQUESTED

Date: February 20, 2015

Time: 10:00 a.m.

Judge: Hon. Samuel Conti

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION
TO EXCLUDE CERTAIN EXPERT TESTIMONY OF PROFESSOR ELZINGA
Case No. 07-5944 SC, MDL No. 1917

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Dell Inc., et al. v. Hitachi, Ltd., et al., Case No. 13-cv-02171

Electrograph Systems, Inc., et al. v. Hitachi, Ltd., et al., Case No. 3:11-cv-01656

Electrograph Systems, Inc., et al. v. Technicolor SA, et al., Case No. 3:13-cv-05724

Interbond Corp. of America v. Hitachi, Ltd., et al., Case No. 3:11-cv-06275

Interbond Corp. of America v. Technicolor SA, et al., Case No. 3:13-cv-05727

Office Depot, Inc. v. Hitachi, Ltd., et al., Case No. 3:11-cv-06276

Office Depot, Inc. v. Technicolor SA, et al., Case No. 3:13-cv-05726

P.C. Richard & Son Long Island Corp., et al. v. Hitachi, Ltd., et al., Case No. 3:12-cv-02648

P.C. Richard & Son Long Island Corp., et al. v. Technicolor SA, et al., Case No. 3:13-cv-05725

Sears, Roebuck & Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd., et al., Case No. 3:11-cv-05514

Tech Data Corp., et al. v. Hitachi, Ltd., et al., Case No. 3:13-cv-00157

Viewsonic Corporation v. Chunghwa Picture Tubes, Ltd., et al., Case No. 3:14-cv-002510

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1 **I. INTRODUCTION**

2 Defendants' motion concerns two discrete portions of Professor Elzinga's expert
3 reports: (1) pages 79-151 of his April 15, 2014 report; and (2) pages 37-62 of his
4 September 26, 2014 reply report. In their opposition, Plaintiffs are long on rhetoric regarding
5 the general admissibility of expert testimony, but short on meeting their burden of proving the
6 admissibility of the portions of Professor Elzinga's reports that are challenged by the
7 Defendants. Specifically, Plaintiffs fail to resurrect Professor Elzinga's reports with respect to
8 the three key issues raised in the motion to exclude:

9 1. Professor Elzinga May Not Present A Factual Narrative To The Jury.

10 Although an expert may rely upon facts or data in formulating an expert opinion, no expert
11 may simply present a factual narrative to the jury divorced from that analysis. Plaintiffs
12 make a generalized argument that Professor Elzinga's narrative provides the factual bases for
13 his opinions, but do not (and cannot) point to any disclosed opinion that relies upon the
14 challenged portions of Professor Elzinga's reports. Their failure to do so only reinforces the
15 conclusion that Professor Elzinga seeks to present an impermissible factual narrative to the
16 jury.

17 2. Professor Elzinga May Not Opine On The Existence Of "Agreements"

18 Because He Is Not Qualified To Make Embedded Legal Conclusions. In his reports,
19 Professor Elzinga makes repeated references to the existence of "agreements" among
20 Defendants. As demonstrated in the motion, expert testimony cannot be explicitly or
21 implicitly used to provide legal meaning or interpretation. This principle applies with much
22 greater force here given that the field of economics contains no concept of "agreement."
23 According to the Plaintiffs, expert testimony is inadmissible only when offered as a "true" or
24 "perfunctory" legal conclusion. This assertion however, is squarely rejected by the authorities
25 cited in the motion, none of which are addressed by the Plaintiffs.

26 3. Professor Elzinga May Not Opine On Defendants' Motive And Intent. No

27 expert may offer opinions regarding a defendant's subjective intent, motive, or state of mind,
28 but that is precisely what Professor Elzinga does when describing facts. Such

1 characterizations are unreliable and unhelpful to the jury and Plaintiffs do not claim to the
2 contrary.

3 Where, as here, the scope of the testimony and the conclusions are fully laid out in the
4 expert report, courts can and should avoid unnecessarily prolonging and interrupting the
5 presentation of expert testimony at trial and decide questions of admissibility prior to trial.
6 For the reasons set forth in the motion and this reply, Defendants' motion should be granted
7 and Professor Elzinga prevented from presenting this particular unhelpful and unreliable
8 testimony.

9 **II. ARGUMENT**

10 **A. Professor Elzinga's Fact Narratives Are Not Connected To** 11 **Any Disclosed Application Of Economic Theory**

12 Plaintiffs devote the majority of their opposition to the premise that Professor Elzinga,
13 as an economist, may apply facts to theory and testify as to the factual bases of the
14 conclusions thereby reached. Opp. at 1-10. According to Plaintiffs, "Defendants complain
15 that Section VII of Professor Elzinga's Expert Report (which sets forth the underlying factual
16 basis for his expert economic analysis) is *too detailed* and provides *too much evidence*,
17 supposedly making it a 'narrative.'" Opp. at 5 (emphasis in original). Plaintiffs argue that,
18 because Professor Elzinga's general methodology is scientifically reliable, both the case law
19 and Rule 702 of the Federal Rules of Evidence require that Professor Elzinga provide the facts
20 identified by Defendants at trial. *Id.*

21 Defendants' motion, however, is not a general attack on Professor Elzinga's
22 methodology. To the contrary, the motion quite clearly states that Defendants do not as a
23 general matter dispute Professor Elzinga's reliance on the documentary record as relevant to
24 his application of economic theory to the facts of the case. Mot. at 8. As stated there and in
25 the economic authorities cited by Plaintiffs, including the authority of Professor Dennis
26 Carlton (Defendants' own expert in this case), the field of economics encompasses the
27 exercise of applying fundamental economic principles and lessons from historical cartels to
28 case facts for purposes of drawing inferences about economic behavior. *See id.*; Opp. at 8-9.

1 The motion also clearly specifies that Defendants do not challenge the entirety of
2 Section VII of Professor Elzinga's opening report, some of which contains Professor
3 Elzinga's application of facts to theory. Mot. at 2. Rather, Defendants challenge as narrative

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Such narrative recitations of facts without analysis have no
8 place in expert testimony. See *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 538
9 (S.D.N.Y. 2004) (recitations of facts do not bring "the fact-finder specialized knowledge or
10 expertise that would be helpful in resolving the issues of fact presented by the lawsuit;" the
11 law does not permit experts to "lend their credentials and reputations to the party who calls
12 them in this manner"); see also *Johns v. Bayer Corp.*, No. 09-cv-1935, 2013 WL 1498965, at
13 *28 (S.D. Cal. Apr. 10, 2013); *Highland Capital Mgmt. L.P. v. Schneider*, 379 F. Supp. 2d
14 461, 469 (S.D.N.Y. 2005).

15 **1. The Fact That Professor Elzinga Offers An Analysis**
16 **Does Not Make All Facts In The Report Admissible**

17 Relying upon *Highland Capital*, Plaintiffs assert that Professor Elzinga's narrative is
18 nonetheless admissible because it is included [REDACTED]

19 [REDACTED]
20 [REDACTED] Opp. at 10. From there they leap to the conclusion that the narrative is admissible
21 because Professor Elzinga is not offered "solely" for purposes of presenting the narrative. See
22 Opp. at 7-8 & n.6 (discussing fact that the expert in *Johns v. Bayer Corp.*, 2013 WL 1498965,
23 at *28 had no admissible analysis). [REDACTED]

24 [REDACTED], stating only in a footnote that the issue is the
25 "same." Opp. at 5 n.4.

26 To the extent that Plaintiffs argue that a narrative is admissible merely because the
27 expert has some admissible analysis, Plaintiffs stretch the language of *Highland Capital* too
28 far. There, the expert was not offered "solely" for purposes of constructing a factual

1 narrative. 379 F. Supp. at 468-69. As here, the expert in *Highland Capital* had a report that
 2 applied facts to theory. *Id.* As here, that expert provided a summary of facts compiled by the
 3 expert from the complaints, pleadings, depositions, and deposition exhibits. *Id.* As here, the
 4 expert's narrative in *Highland Capital* was not connected to his conclusions by any disclosed
 5 application of those facts. *See id.* The court, examining the narrative section alone, held it
 6 inadmissible because the challenged section consisted "solely" of a narrative. *See id.*
 7 ("Because the 'Facts' section of the [expert report] contains a factual narrative of the case and
 8 addresses 'lay matters which the jury is capable of understanding and deciding without the
 9 expert's help, it is inadmissible.") (citation omitted).

10 The fact that Professor Elzinga's "facts" are not contained in a separate "facts" section
 11 does not distinguish his report from that addressed in *Highland Capital*. His narrative exists
 12 under a stand-alone header separate from the analysis. In any event, numerous courts have
 13 rejected the narrative portions, even individual paragraphs, of an expert's report inadmissible
 14 at trial while at the same time leaving other portions containing analysis undisturbed. *See,*
 15 *e.g., In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d at 551 (rejecting specific paragraphs of
 16 expert report in narrative form) (*citing inter alia Taylor v. Evans*, No. 94-cv-8425, 1997 U.S.
 17 Dist. LEXIS 3907, at *2 (S.D.N.Y. Apr. 1, 1997) (rejecting narrative portions of expert
 18 report)); *Lopez v. I-Flow, Inc.*, No. 08-cv-1063, 2011 WL 1897548, at *10 (D. Ariz. Jan. 26,
 19 2011) (addressing specific paragraphs in report). *Rezulin* and other cases squarely contradict
 20 any assertion that facts presented in a report are transformed into admissible testimony merely
 21 because they were reviewed and cited by an expert who otherwise has admissible testimony.

22 **2. The Narratives Are Not Facts That Form The Bases Of** 23 **Any Disclosed Opinion**

24 Plaintiffs recognize that, in order to be admissible, the economist must present a
 25 "detailed explanation of how economic principles are applied to the facts present in this case."
 26 Opp. at 9. But their assertion that the challenged narrative consists of the "exacting" or
 27 "excruciating" detail that forms the bases of Professor Elzinga's opinions (Opp. at 13) rings
 28 hollow. In the first place, Plaintiffs do not show any application by Professor Elzinga of the

1 facts in his narratives to economic theory. Indeed, elsewhere in the opposition, Plaintiffs
2 affirmatively identify [REDACTED]

3 [REDACTED]
4 [REDACTED] [REDACTED] [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 Second, Plaintiffs' assertion is contradicted by their own expert, who did not purport
8 to rely on the challenged factual narrative for purposes of the preceding conclusions. In his
9 own words, [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED] As described in the motion, having applied selected facts to theory for
15 purposes of concluding the likely cartel, there is no place for Professor Elzinga to provide a
16 further narrative description divorced from that analysis. Mot. at 8. Rule 702 of the Federal
17 Rules of Evidence simply does not allow the presentation of narrative facts by experts in this
18 manner.

19 Finally, even setting aside the actual structure of the report and Professor Elzinga's
20 own words, the narratives are inadmissible because the connection between those facts and
21 any of Professor Elzinga's conclusions are not disclosed. Plaintiffs are simply wrong to
22 conclude that as the factual bases for his opinions, Professor Elzinga's narratives are in full
23 compliance with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. *See Opp.* at 10.
24 To be admissible at trial, the expert's opinion must be disclosed within an expert report. Fed.
25 R. Civ. P. 37(c)(1); *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th
26 Cir. 2001). The expert report "must contain...a *complete* statement of all opinions the witness
27 will express and the *basis and reasons* for them." Fed. R. Civ. P. 26 (a)(2)(B)(i) (emphasis
28 added). "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court

1 to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the
2 expert.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

3 It is not enough for an expert to lay out facts, offer conclusions, and summarily state
4 that facts were considered for purposes of the opinion. An expert who presents a narrative “of
5 events and quotations and then leaps to a conclusion without sufficient explanation” in an
6 expert report cannot present that narrative as the basis for opinions at trial. *Lopez*, 2011 WL
7 1897548, at *10; *see also Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 929-30 & n. 3 (N.D.
8 Cal. 1996) (striking expert declaration that was merely factual narrative interspersed with
9 unfounded opinions); *FreeLife Int’l, Inc. v. Am. Educ. Music Publ’ns*, 2010 WL 1252568, at
10 *3 n.5 (D. Ariz. Mar. 25, 2010) (“Experts will not be permitted to express opinions or to
11 provide bases or reasons for the opinions that are not in their reports.”); *Linkco, Inc. v. Fujitsu*
12 *Ltd.*, No. 00-cv-7242, 2002 U.S. Dist. LEXIS 12975, at *13-14 (S.D.N.Y. July 16, 2002)
13 (rejecting expert narratives and stating “If experts are permitted to testify on an issue of fact,
14 they must provide some explanation for their conclusions, rather than referring generally to
15 their experience. Without good explanations, courts cannot assess the reliability of any
16 conclusion drawn by an expert, even if he possesses relevant experience.”).

17 The only connection between Professor’s Elzinga’s descriptions in the sections of his
18 reports [REDACTED]
19 and any conclusions is the *ipse dixit* of his prior analysis. That is not the admissible analysis
20 of an expert economist applying facts to theory. To the contrary, it is the work of
21 “conspiracy-ology” — the practice of inferring conspiracy and a practice that Professor
22 Elzinga purports to condemn. Mot. at 9. Notably, Plaintiffs do not show how or where any of
23 the facts in the narratives were applied by Professor Elzinga in any analysis. Lacking any
24 such analysis, Professor Elzinga’s narratives are indistinguishable from those excluded in
25 *Highland Capital* and other cases and should be similarly excluded.

26 Plaintiffs cite to no case allowing the presentation of narrative facts, claiming only that
27 Judge Illston in *In Re: TFT-LCD (Flat Panel) Antitrust Litigation* “rejected identical
28 arguments.” Opp. at 2, 6-7. Plaintiffs’ characterization of that order is incorrect and their

1 reliance therefore misplaced. Judge Illston in the LCD matter addressed the expert testimony
 2 in the context of a short motion in limine. She did not reject the arguments. She instead
 3 denied the motion without prejudice to arguments to be made at trial. Ex. 2 to Bernstein Decl.
 4 (*In re: TFT-LCD (Flat Panel) Antitrust Litig.*, Final Pretrial Scheduling Order at 6, No. 07-
 5 md-1827 (N.D. Cal. May 4, 2012), ECF No. 5597). Second, the arguments there were not
 6 identical to those made here. Plaintiffs assert generally that the Defendants to the LCD
 7 motion *in limine* tried to exclude an expert from presenting the factual bases for the opinion,
 8 but make no effort to explain what the expert there was offering or how it is analogous to
 9 Professor Elzinga. *See* Opp. at 6-7. Among other things, the LCD expert did not present a
 10 70-page factual narrative of the type offered by Professor Elzinga. The question of the
 11 presentation of facts divorced from an analysis was also not before the LCD Court. As
 12 described above the challenged narrative portions of Professor Elzinga's testimony are
 13 demonstrably analogous to those offered in *Highland Capital*. The narratives and testimony
 14 offered there were excluded before trial and should be excluded here as well.

15 **B. Professor Elzinga Cannot Make Embedded Conclusions And**
 16 **Inferences Regarding Non-Economic Motive And Intent**

17 Plaintiffs argue generally that Professor Elzinga's embedded legal conclusions and
 18 intent testimony are admissible, but without any reference or argument directed to the specific
 19 inferences or conclusions as actually drawn by Professor Elzinga. Plaintiffs do not address
 20 Defendants' argument that Professor Elzinga has no basis to present his opinion [REDACTED]
 21 [REDACTED] Mot. at 10. Plaintiffs bear the burden of proving the
 22 admissibility of this testimony, and thereby concede this point. *See Cannon v. Wells Fargo*
 23 *Bank, N.A.*, 952 F. Supp. 2d 1, 11 (D.D.C. 2013) (where brief did not address certain
 24 arguments raised by the opposing party those matters were deemed conceded). Moreover,
 25 Plaintiffs do not directly address the propriety of Professor Elzinga's use of the term
 26 "agreements" or his attribution of non-economic and subjective motive and intent to
 27 Defendants. As described in the motion and below, neither form of testimony is admissible in
 28 this case.

1 **1. Professor Elzinga’s Embedded Conclusions Regarding**
 2 **“Agreements” Are Inadmissible.**

3 Plaintiffs do not deny that Professor Elzinga draws inferences from the record
 4 regarding the existence of “agreements,” including from the third-party industry newsletters
 5 and other sources identified in the motion. Nor do Plaintiffs dispute that the word
 6 “agreement” is a legal term within the context of this case. Plaintiffs do not dispute that
 7 Professor Elzinga lacks any special expertise to identify the existence of agreements, whether
 8 used in a legal or any other sense. Finally, Plaintiffs do not dispute that inferences and
 9 conclusions of “agreement” are to be made by the jury in this case. *See* Opp. at 15 n.12.

10 According to Plaintiffs, Professor Elzinga’s inferences and conclusions regarding
 11 agreements are admissible because they are not offered as “true” or “perfunctory” legal
 12 conclusions. Opp. at 13. In support, Plaintiffs claim that the Ninth Circuit rejected
 13 Defendants’ “very argument” in *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d
 14 998, 1016-17 (9th Cir. 2004). Opp. at 13. *Hangarter*, however, did not address an economist
 15 drawing inferences of “agreement” from the record in a conspiracy case. It involved an
 16 accounting expert who testified in a litigation regarding disability benefits that the defendant
 17 insurer had departed from insurance industry norms in denying certain benefits to the plaintiff.
 18 *Hangarter*, 373 F.3d at 1016-17. During the testimony, the expert referenced a law governing
 19 insurance claims adjustments. The Ninth Circuit held this testimony admissible even though
 20 the expert relied in part on his understanding of the requirements of that law. The expert did
 21 not improperly instruct the jury as to the applicable law or usurp its role because the law
 22 referenced was not at issue in the litigation and was ultimately “ancillary to the ultimate issue
 23 of bad faith” in the case. *Id.* at 1017. Similarly, Plaintiffs’ reference to certain trial testimony
 24 and rulings by Judge Illston and the LCD case is misplaced. Opp. at 6-7. The question
 25 addressed in the excerpts cited by Plaintiffs was whether the expert could properly draw
 26 inferences from legal documents such as interrogatory responses (as compared to
 27 contemporaneous business records). *See id.* (citing selected rulings at trial). The LCD expert
 28 moreover did not purport to offer a narrative “record of agreements.”

1 In this case, the question of the existence of agreements is in no way “ancillary” to
 2 ultimate issues the jury will be called upon to decide. It is indisputably the first issue the jury
 3 will be called upon to decide. Moreover, unlike the claims adjuster in *Hangerter*, Professor
 4 Elzinga’s profession does not require or enable him to work with the application of the law.
 5 As explained in the motion, experts in antitrust cases may not opine whether an illegal
 6 conspiracy or agreement actually existed. Mot. at 11-12 (citing *U.S. Info. Sys., Inc. v. Int’l*
 7 *Bhd. of Electric Workers Local Union No. 3*, 313 F. Supp. 2d 213, 239-40 (S.D.N.Y. 2004);
 8 *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1322 (W.D. Ga.
 9 2002)). In *U.S. Info. Systems*, the expert was precluded from testifying as to whether the
 10 defendants “did or did not engage in anticompetitive conduct” as part of his general
 11 application of facts to theory. *Id.* at 240-241. According to the court, such “embedded legal
 12 conclusions”—whether intended as such or not—were inadmissible. *Id.* Although the expert
 13 there could testify as to factors which make behavior anticompetitive, he could not present to
 14 the jury the inference that it *was* anticompetitive, which is for the jury to decide. *Id.*; *see also*
 15 *Ohio v. Louis Trauth Dairy*, 925 F. Supp. 1247, 1254 (S.D. Ohio 1996) (holding that,
 16 although experts’ antitrust analysis is admissible, conclusions as to existence of conspiracy as
 17 based on that analysis improperly embraced a legal conclusions and were inadmissible); *cf.*
 18 *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 709 (2d Cir. 1989) (deeming expert use
 19 of the term “negligent” in railroad accident case inadmissible). Such testimony “merely tell[s]
 20 the jury what result to reach” and is therefore inadmissible. Fed. R. Evid. 704, 1972 advisory
 21 cmte. note. Professor Elzinga would go even further than the expert in *U.S. Information*
 22 *Systems* who testified as to anticompetitive “conduct” and offer conclusions of
 23 anticompetitive “agreements.” Professor Elzinga indisputably has no qualifications to make
 24 such conclusions and his testimony presents no expertise that can provide assistance to the
 25 trier of fact in that regard.

26 Plaintiffs’ only response directed to Professor Elzinga’s actual testimony is to say that
 27 Professor Elzinga is not offering the existence of “agreements” as legal opinion. Opp. at 13.
 28

1 As explained in the motion, it does not matter whether Professor Elzinga intends to offer a
 2 “true” legal conclusion: “the risk that a jury, confronted with a credentialed expert, would be
 3 confused or give undue deference to the expert’s implicit characterization of the evidence is
 4 simply too great.” Mot. at 12 (citing *Hygh v. Jacobs*, 961 F. Supp. 359, 363 (2d Cir. 1992);
 5 *United States v. Saya*, 961 F. Supp. 1395, 1397 (D. Haw. 1996); *U.S. Info. Sys.*, 313 F. Supp.
 6 at 241 (“recognizing that the ultimate determination of what did or did not happen in this case
 7 is left to the finder of fact” and that an expert in an antitrust case could hypothesize that if
 8 certain conduct did occur, the market would react a certain way, but could not testify that such
 9 conduct did in fact occur)). Professor Elzinga [REDACTED]

10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] Mot. at 3-5. Even setting aside the
 15 questionable veracity of Plaintiffs’ assertion that Professor Elzinga never purports to express
 16 an opinion regarding any Defendants’ participation in the alleged cartel, it is impossible to see
 17 how any juror hearing Professor Elzinga draw inferences and testify that the record shows a
 18 history of “agreements” would not be confused as to the nature of Professor Elzinga’s opinion
 19 or otherwise give Professor Elzinga special deference in this regard. *See, e.g., U.S. Info. Sys.*,
 20 313 F. Supp. 2d at 240; *Hygh*, 961 F.2d at 364 (deeming expert testimony that Defendants’
 21 conduct was not “justified under the circumstances” and not “warranted under the
 22 circumstances” inadmissible). There is simply no basis to allow Professor Elzinga to draw
 23 these inferences about or usurp the role of the jury directly or indirectly by characterizing
 24 facts as “agreements.”

25 **2. Professor Elzinga’s Inferences Of Subjective Motive** 26 **And Intent Are Inadmissible.**

27 In the motion, Defendants identified numerous examples of Professor Elzinga
 28 attributing subjective motive and intent to Defendants’ actions. Plaintiffs in a footnote offer

the non-sequitur that “economists commonly evaluate how rational economic actors make choices.” Opp. at 6 n. 5. Defendants do not dispute Professor Elzinga’s qualifications to draw economic inferences from the record. Instead, Defendants seek to exclude Professor Elzinga’s further opinions regarding defendants’ subjective intent, motive or state of mind that have nothing to do with economic intent. These inferences are not Professor Elzinga’s interpretations of facts as an economist, but his characterization of what was “recognized,” “clear” or otherwise meant by Defendants subjectively. Mot. at 4. Plaintiffs’ position that the testimony is admissible because Professor Elzinga is not improperly “weighing conflicting testimonial evidence” (Opp. at 11) misses the point. Certainly, Professor Elzinga cannot weigh conflicting testimonial evidence. The issue here is whether an expert can infer subjective motive and intent. It is well-established no “expert testimony is []relevant if the expert is offering a personal evaluation of the testimony and credibility of others *or the motivations of the parties.*” *U.S. Info. Sys.*, 313 F. Supp. 2d at 226 (emphasis added).

Plaintiffs address none of the authorities cited in the motion on this point and offer nothing to the contrary. They provide no examples of Professor Elzinga drawing what they would consider to be proper inferences of motive and intent of any kind. They are moreover silent on [REDACTED]

[REDACTED] Mot. at 4. Here again, their reliance on the LCD trial is misplaced and unaccompanied by attempt to explain the circumstances of that case as potentially applicable here. Opp. at 7. Among other things, the LCD expert did not claim to possess an “intellectual filter” of any kind to enable him to interpret the meaning of language. Professor Elzinga’s approach was squarely rejected in *U.S. Info. Sys.* and no different result is warranted here.

C. Plaintiffs Cannot Refer To Unspecified Documents To Either Support Professor Elzinga Or Delay Decision On The Motion

Plaintiffs’ incredible suggestion that Professor Elzinga does not engage in any kind of “interpretation” or “speculation” because unspecified documents in this case “show[] these intentions without question” and with “complete clarity” (Opp. at 15) is worth no

1 consideration by this Court. Plaintiffs do not even offer a single document from the purported
 2 “mountain” of conspiracy communications to support this suggestion. A court necessarily
 3 cannot consider an argument based on facts not before it. *See, e.g., Boyd v. United Transp.*
 4 *Union Ins. Ass’n*, No C05-1413, 2006 WL 581025, at *4 (W.D. Wash. Mar. 7, 2006) (refusing
 5 to consider argument on conflict of interest where doing so would require the court to
 6 consider facts not presented to it).

7 Plaintiffs’ argument is moreover both factually and legally erroneous. [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] *see, e.g.,*
 11 *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (“The exchange of price
 12 data and other information among competitors does not invariably have anticompetitive
 13 effects; indeed such practices can in certain circumstances increase economic efficiency and
 14 render markets more, rather than less competitive.”). Professor Elzinga has already
 15 acknowledged that he draws inferences of agreement and other motive and intent from
 16 ambiguous documents, [REDACTED]

17 [REDACTED] Mot. at -5.

18 By their opposition, Plaintiffs argue that the admissibility of Professor Elzinga’s
 19 testimony can be deferred and later reviewed “within the context of the evidence adduced at
 20 trial.” Opp. at 1-2 & nn. 1 & 2. Defendants disagree. Courts, acting in their role of
 21 gatekeeper of expert testimony, routinely address and decide questions of narratives,
 22 embedded legal conclusions, and subjective motive and intent *before* trial. Where, as here,
 23 the scope of the testimony and the conclusions are fully laid out in the expert report, courts
 24 can and should decide questions of admissibility prior to trial. *See Lopez*, 2014 WL 1897548,
 25 at *11; *Highland Capital*, 379 F. Supp. 2d at 474 (finding no need to defer to trial decisions
 26 on what is clearly inadmissible testimony); *Kidder, Peabody & Co. v. IAG Int’l Acceptance*
 27 *Group NV*, 14 F. Supp. 2d 391, 404 (S.D.N.Y. 1998) (holding that “the detailed reasoning
 28 contained in the report makes it unnecessary to defer this conclusion until his deposition has

1 been taken or the trial has begun”); *e.g.*, *U.S. Info Sys.*, 313 F. Sup. 2d at 240-41 (deciding
2 before trial that expert in antitrust case would be allowed to testify at trial regarding factors
3 tending to show anticompetitive conduct as applied to industry, but not to narrative portion of
4 report or to suggest fact of actual anticompetitive behavior or other intent).

5 Defendants have specified the exact pages which contain Professor Elzinga’s improper
6 narrative. Moreover, Defendants have identified Professor Elzinga’s use of the word
7 “agreements” and attributions of subjective motive and intent and explained that he has no
8 basis to offer those conclusions under any circumstances. The Court needs nothing more to
9 decide the motion. Plaintiffs offer nothing to support their implied assertion that there might
10 be circumstances at trial that nonetheless would impact this Court’s consideration of Professor
11 Elzinga’s testimony as already disclosed. Of equal importance, they do not present any
12 argument as to why this Court *cannot* decide this motion now and thus avoid the inevitable
13 objections, sidebars and other distractions that will necessarily accompany any decision to
14 defer this decision until trial. For example, each time Professor Elzinga testifies as to a fact
15 relied on Plaintiffs would be obligated to demonstrate that the fact was contained in the
16 analysis and not the narrative sections of his reports. This Court should instead decide the
17 motion now and in Defendants’ favor, precluding Professor Elzinga from presenting at trial a
18 narrative, inferences about the existence of “agreements,” and inferences about Defendants’
19 motive and intent.

20 **III. CONCLUSION**

21 For these reasons and the reasons contained in our initial motion, the Court should
22 preclude Professor Elzinga from presenting at trial the testimony contained on pages 79-151
23 of the April 15, 2014 Expert Report of Professor Kenneth G. Elzinga and pages 37-62 of the
24 September 26, 2014 Reply Expert Report of Professor Kenneth G. Elzinga.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 9, 2014, I caused a copy of “DEFENDANTS’ REPLY MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE CERTAIN EXPERT TESTIMONY OF PROFESSOR KENNETH ELZINGA” to be electronically filed via the Court’s Electronic Case Filing System, which constitutes service in this action pursuant to the Court’s order of September 29, 2008.

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